

FORMAL ORDER

STATE OF ARKANSAS,)
)
In the Supreme Court) SCT. 10-351

BE IT REMEMBERED, That at a session of the Supreme Court of the State of Arkansas, begun and held in the City of Little Rock, on April 12, 2010, amongst others were the following proceedings, to-wit:

Don W. Davis

Petitioner

vs. from Pulaski Circuit, Sixth Division - (CV2010-1118)

Arkansas Department of Correction and
Ray Hobbs, in His Official Capacity as
Acting Director of the Arkansas Department
of Correction

Respondents

Emergency motion for reconsideration or, in the alternative, to renew petition for stay of execution. Stay of execution granted. Brown, J., concurs. Wills, J., not participating.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Leslie W. Steen, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 12th day of April, 2010.

Clerk

By: _____ D.C

Original to Governor Mike Beebe

cc: Deborah R. Sallings, Counsel for Appellant
Don W. Davis
C. Joseph Cordi, Jr., Assistant Attorney General
Shawn J. Johnson, Assistant Attorney General
Ray Hobbs, Acting Director, ADC

SUPREME COURT OF ARKANSAS

No. 10-351

DON WILLIAM DAVIS,

PETITIONER,

VS.

RAY HOBBS, DIRECTOR, ARKANSAS

DEPARTMENT OF CORRECTION,

RESPONDENT,

Opinion Delivered 4-12-10

PETITION FOR STAY OF
EXECUTION

CONCURRING OPINION.

ROBERT L. BROWN, Associate Justice

I would stay the execution of Don W. Davis that is scheduled for today, for the following reasons. The stay will allow the pending claim in Pulaski County Circuit Court that the new Method of Execution Act (Act 1296 of 2009) violates the separation-of-powers clause of the Arkansas Constitution to be resolved.¹ The Eighth Circuit Court of Appeals lifted the stay of Davis's execution on April 9, 2010, by a vote of two to one. That decision does not decide the state issue.

This case satisfies each of this court's announced criteria for imposing a stay of execution: (1) a constitutional issue of first impression is pending; (2) the issue is one of public significance; (3) the issue of a state stay only became ripe after the Eighth Circuit decision; (4)

¹The claim is that the General Assembly, by Act 1296, gave the Director of the Department of Correction unfettered discretion to formulate the process and chemicals for a state execution which can be altered at any time. This, according to the argument, is an unconstitutional delegation of power by the General Assembly.

whether the new execution protocol violates the Arkansas Constitution is for Arkansas courts and not federal courts to decide; and (5) the separation-of-powers issue under the Arkansas Constitution cannot be decided before the execution which, again, is scheduled for today. *See Singleton v. Norris*, 332 Ark. 196, 964 S.W.2d 366 (1998) (per curiam).

The State argues that prison officials will execute Davis using the protocol that was approved by the federal courts under the old version of the method-of-execution statute. *See Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010). Under Act 1296, however, the argument made by Davis is that the Director of the Department of Correction can change the execution protocol at any time, including at the last minute. The pending constitutional question is whether the General Assembly has breached the separation-of-powers provision of the Arkansas Constitution by this grant of power to the Department Director.

At this writing, it is unknown whether the separation-of-powers argument made by the death row inmates will prevail in state court so as to render Act 1296 unconstitutional. Accordingly, I would stay the execution of Don W. Davis in order for that determination to be made.